VIRGINIA LAW REGISTER

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116 Virginia.

Through the courtesy of the Michie Company we have received 116 Virginia, containing the decisions of our Supreme Court from March 1st, 1914, to January 1st, 1915. One hundred and twenty-two cases are reported; one hundred and eight civil and four criminal. Sixty-five cases are affirmed—one by a divided court. Appeals are dismissed in four, and a mandamus refused in one; fifty-two cases are reversed. Every criminal case is reversed.

Nearly every case in this volume has been reported in full or digested in the REGISTER, so extended comment is unnecessary. A remarkable feature of this volume is the fact that not a single dissenting opinion is handed down. The Court was unanimous in every case but one, in which the Court, consisting then of four judges, divided. There are many questions of much interest which are settled by the decisions reported in this volume, and a resumé of some may not be unprofitable.

Merchant *v.* Shry, p. 437, holds that a suit against a convict must be brought against a Committee, which the suitor may have appointed, but that the convict cannot as at common law be sued in this State.

Spencer *v.* Looney, p. 767,—an important case upon privileged communications, holds that a communication made to proper school authorities as to the race of a scholar is one of qualified privilege, but if made in strong and violent language, disproportioned to the occasion, the privilege is lost.

Boyd *v.* Boyd, p. 326, holds that it is not necessary to prove actual pecuniary loss, resulting from the utterance of insulting words, in order to recover punitive damages.

Smith *v.* Ramsey, p. 530, settles the vexed question as to the

words "cut and remove," in regard to standing timber sold. Timber must be cut AND removed in the time given, and cut timber unremoved in the time remains in the owner of the land.

Morris *v.* Commonwealth, p. 912, defines the word "merchant."

Stansbury *v.* Richmond, p. 205, holds a municipal corporation liable in damages to an individual, caused by a failure to furnish an adequate supply of water, only when it is shown after the system has been completed that such system is inadequate and inefficient to meet the requirements.

Edgewood, etc., *v.* Roper, p. 624, holds that a stock of goods ceases to be shifting upon the death of the owner and becomes fixed and stable, so that homestead can be claimed by the infant children of the deceased.

Williams *v.* Commonwealth, p. 272, is an important decision as to the meaning of the words "resident" and "residence."

Thomas *v.* Brown, p. 233, is a rather startling construction of Sec. 2858 of our Code, and by some lawyers has been held to be a practical destruction of the statute law. Creditors accepted $6,000.00 in full of a debt of $6,450.54, because they were in desperate straits for money, and this amount was offered to and accepted by them because otherwise they would have had to sue. This looks to us rather as "an agreement," and does set a somewhat dangerous precedent, but certainly under the facts of that particular case righted a palpable wrong and injustice.

Commonwealth *v.* Richmond, p. 69, settles the question as to whether property owned and used by municipalities for municipal purposes, though a profit is obtained therefrom, can be taxed, in the negative.

Of course we do not wish to be understood that these are the only cases of great importance, for the book, as usual is full of cases of great import to all lawyers, but in the short space allowed us we thought that the allusion to the cases mentioned would not fail to be of interest to the profession.

The Rights of Pedestrians Crossing Streets.

One who is in the habit of frequenting large cities would be tempted to say that pedestrians have no rights. Paris frankly denies them any, for in that city if a cab or automobile knocks down an unfortunate pedestrian, he is promptly arrested and fined for permitting himself to be thus treated. *"Caveat Ambulator"* is the rule over in *La Belle France*. English-speaking people, however, hold that the right of the pedestrian is in most instances equal, and in some superior, to the "man on horseback" or in the vehicle. But this right, in cities, is limited in a very wise and common-sense-like way. A person on foot has no right to cross the street, except at street crossings, superior to the horseman, driver or chauffeur. In the case of Percy *v.* Sandrowitz, 180 N. Y. 297, it was held that a person crossing between streets did so at his peril. But in a comparatively late case, Baker *v.* Close, Judge Werner, of the Court of Appeals puts the law in such terse and clear terms that we can not forbear quoting it.

Says the judge in delivering the opinion of the court:

> "The duty of the wayfarer to look both ways, to listen, and, if necessary, to stop, at a grade crossing of a steam railroad grows out of the obvious and constantly impending dangers which cannot always be avoided by drivers of steam engines drawing heavy trains at the high rate of speed which is necessary to insure efficient railroad service. The reason of the rule is so obvious that it needs neither explanation nor justification. In the nature of things the duty referred to must be imposed upon the wayfarer as a matter of law.
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> "It is different, however, as to the rights and duties of pedestrians and drivers in the use of crossings on our city streets. There the right of passage is common to all, and both footmen and drivers are bound to exercise reasonable care for their own safety and the safety of others upon the street. The rigorous rule applicable to steam railroad crossings is necessarily relaxed at the usual street crossings, and the footman is not required, as a matter of law, to look both ways and listen, but only to exercise such reasonable care as the case requires, for he has the right to assume that a driver will also exercise due care and approach the crossings with his vehicle under proper control. At such street crossings both pedestrians and drivers are required to exercise that de-

gree of prudence and care which the conditions demand. It is impossible to formulate any more precise definition of these relative rights and duties.

"The only modifications of this general rule, that 'there is an equality of right as between pedestrians and drivers in the use of public streets,' are that street cars which run upon a fixed or stationary right of way can not turn aside to avoid collisions as other vehicles can, and to that extent they must have the right of way; and that a pedestrian who crosses a street at a place where there is no regular crossing may be chargeable with some additional vigilance because it is not a place set aside for the crossing of foot passengers, although even at such a place drivers are required to be watchful and careful."

The Newspapers and Public Policy.

Our English brethren are beginning to experience the same difficulty with which our Supreme Court of the United States has been struggling for some time in regard to the question of public policy, and a rather curious case arose during the past summer when the Court of Appeals had before it the case of Neville *v.* Dominion of Canada News Company. This newspaper company stipulated for a consideration that it would refrain from commenting upon a land company or upon any of the investments of the capital of the said company, as long as the said land company subsidized it. The land company got tired of carrying out its part of the contract, and, strange to say, the newspaper sued the land company for failure to continue the subsidy. The Lord Chief Justice very vigorously laid down the rule that "for a newspaper to stipulate for a consiceration that it will refrain from commenting on fraudulent schemes, when it is the ordinary business of the newspaper company to comment upon fraudulent schemes, is in itself a stipulation which is quite contrary to public policy and which can not be enforced in a court of law." We are at a loss to understand why the learned judge resorted to "public policy" for a reason to avoid this contract. It was certainly a case of mutual fraud on both sides, one perpetrating a fraud and the other aiding and abetting it by agreeing to keep silent in regard to the fraud, although the newspaper had been in the habit of exposing fraudulent schemes, that being one of

its chief boasts. We think it is a decided and unnecessary extension of the doctrine of "public policy." Anson on the Principles of the Law of Contract, 13 Ed. p. 232, lays down the law that one of the cases to which the doctrine applies is, "agreements to do that which it is the policy of the law to prevent." To this definition we may now add, "agreements to refrain from doing that which it is the policy of the law or the state to encourage." We do not think that in any way, as has been claimed by some, this extends to freedom of the press or freedom of contract. We think the application of the well-settled principle of the law that in cases of mutual fraud or attempt to commit fraud the law will not interfere, might have very well applied to this case.

Proceedings under the Act to Ascertain the True Boundary Lines of Real Estate.

For the first time since its passage, the Act approved March 4th, 1912, Acts of 1912, page 133, has come before our Supreme Court of Appeals and the decision of the Court will be read with much interest. As will be remembered, this act provides that any person having an interest in real estate, upon petition filed in the Court which would have jurisdiction in an act of ejectment concerning such real estate, shall have the right to have ascertained and designated by the said Court the proper boundary line, or lines, of such real estate as to one or more of the coterminus land owners. All persons interested in the coterminus real estate are required to be made parties to the said petition, which shall be matured for hearing as provided for maturing an action of ejectment, except that it shall not be necessary to serve a copy of the petition.

It was further provided that the trial of the case shall be conducted as other trials at law, and the same rules of evidence shall apply and the same defences shall be made as at other actions at law. The object of this statute, as is well known, was to simplify as far as possible disputes about boundary lines between coterminus owners, and to broaden the somewhat narrow lines of practice in ejectment proceedings.

In the case of Wright *v.* Rabey, the case in which the opinion was handed down by the Court, on September 9th, 1915, Mrs. Rabey, pursuant to the statute, filed her petition in the lower court against Frank Wright and wife and others, setting up the ownership of a certain lot of land, containing three and three-twentieth acres, its location and the sources of her title thereto, the boundaries of her land, the ownership of the lands of the defendants adjoining hers, and then sets forth that the part of the southern boundary of her land which divides it and the land of the said defendant Wright, and the whole of the western boundary which divides her land and the land of another defendant, Hargrove, remain undefined and are undetermined and indefinite, and praying that the said disputed, undetermined and unascertained lines may be ascertained and designated by the Court as between petitioner and her aforementioned coterminus land owners, according to the provisions of said statute. The counsel for defendant Wright evidently took the statute to mean, as many of us thought that it meant, that the pleadings were to be somewhat informal, and filed a lengthy answer to the petition, which answer the Court struck out, and thereupon Wright and wife filed various pleas. It is as to the question of practice under this statute that this case becomes of importance. As Judge Cardwell, in delivering the opinion of the Court says:

> It is to be observed that the second provision of the statute expressly prescribes a procedure of the defendant for the filing of the petition in that it expressly adopts in substance at this stage of the proceedings the pleadings prescribed in an action of ejectment for the defendant. The title of the act is "to authorize the ascertainment and designation of the boundary lines of real estate," and it was clearly within the contemplation of the Legislature that just such conditions as those presented in the petition of defendant in error presented in this cause might exist, and to provide a summary method and a proceeding by which such disputes might be settled and determined, without having a great deal of technical formality about it, and the true boundary line, or lines between coterminus land owners or claimants designated, the determination of the dispute to be by trial before a jury or the judge of the Court, where trial by jury is waived by the parties to the controversy, and upon issue or issues joined between them as in other actions at law.

The Supreme Court holds that even were it considered that the defendants in the lower court had the right to file the answer they tendered, yet they were not prejudiced, since the matters set up therein which were not mere conclusions of law relied on by way of defence, could have been and were as far as proper set up under the issues made by the pleas they were allowed to file. It may, therefore, be taken as settled law that the proceedings under the Act of March 4th, 1912, differ only from an action of ejectment in that a petition is filed instead of a declaration and that no copy of this petition need be served on the defendant, and the Court is certainly rignt in considering the language of the statute to be as indicated; for by its express terms the petition shall be matured for hearing as provided for maturing an action of ejectment except that it shall not be necessary to secure a copy of the petition. We would therefore suppose that the defendant in such a case is narrowed in his defence to the only defences which are permitted in an action of ejectment and that an equitable defence cannot be set up in answer to the petition, but that any defendant having such a defence would be compelled as heretofore to enjoin all proceedings at law and set up his defences in a suit in equity. Whilst we do not see very well how any other conclusion could have been reached by the Court, we do not believe it was the intention of the Legislature to so narrow proceedings under this act, and we trust that a proper amendment may broaden this very salutary statute, which certainly has this advantage over an action of ejectment in that any person having an interest in real estate, whether in possession or out of possession, having the legal title or the equitable title, may proceed under it.

Rights of the Public in Streets Dedicated.

In the case of Sipe *v.* Alley, decided September 9th, 1914 our Supreme Court has handed down a valuable opinion in regard to lots, streets, and alleys, mapped and platted, and the map and plat recorded. The Court, in construing Section 2510a of the Code of 1904, holds that when lands are laid off into lots, streets, and alleys, and a map and plat thereof made and recorded of lots sold and conveyed, all

references thereto, without reservation carry with them, as appurtenant thereto, the right to the use of the easement in such streets, and alleys necessary to the value of said lots and that this right does not merely apply to the owners of lands or lots abutting on the streets, etc., but to all those who buy with reference to the general plan or scheme disclosed by the plat or map, and that it is not material whether or not the use of such streets, etc., is a further necessity.

The Court further holds that delay in opening a street is not an abandonment thereof, except so far as statutory or charter provisions affix a rule to the contrary; nor is a mere nonuser of a portion of a street fenced in with abutting property an abandonment of the street by the public. Some private use of the public way is not infrequently accorded abutting owners until the public use requires its surrender. Counsel for the parties, holding that one of the streets in question had been abandoned and should not now be opened, relied upon James *v.* Roanoke Island Association, 111 Va. 254, and Glasgow *v.* Matthews, 106 Va. 14, and at first glance it would look that these two cases were in direct conflict with the case under discussion; and certainly as to the last named case there does seem a serious conflict, and to one who read merely the syllabus of this latter case, it would look as if a direct conflict had taken place, but an examination of this case shows that the whole scheme of developing the celebrated "City" of Glasgow fell entirely through and that the land of the Company was sold in a suit in the United States Circuit Court for the Western District of Virginia. There was a general failure of the whole building scheme, as was also the case in Chambers *v.* R. I. Ass'n., and we think the decision in the case under discussion is certainly a correct interpretation of the law where there is a continued development of property thus laid off, mapped and platted.

Another Instance of Careless Legislation.

We are often called upon to lament the careless way in which state legislatures frame and enact laws. It would seem that Congress is sometimes as lax, if the Supreme Court of the United States sustains Judge Hough of the Federal Court in New York City in the case

of Hubbard *v.* Lowe, Collector, etc., decided Oct. 13th, 1915. This decision annuls and destroys the so-called "Lever Act," intended to suppress "gambling in futures" in cotton. This act imposed a heavy tax upon cotton which was sold under any contract which did not conform to the standard forms laid down therein.

The ground of Judge Hough's decision was that the Act had to be construed as a Revenue Act, and the so-called revenue feature not having originated in the House of Representatives as required by the Constitution, the Act was void. The bill was introduced in the Senate, without the tax provisions, which were added in the Committees of conference between the two houses. The judge holds that the law is not and never was "one of those legislative products which to be a law must originate in the Lower House." It was argued by counsel for the government that the law was only a tax law in form and that the object of the law was simply to suppress gambling in cotton futures, and that there was nothing further from the intent of the legislators than to raise any revenue by the taxation of cotton futures. The Judge, replying to this argument, said:

> "As in one case cited," the Legislature desired to suppress the sale of colored oleomargarine, so here it desired to destroy every form of contract for future delivery of cotton, except that marked out by the statute. In both instances the object was sought to be attained by a tax, intended to be prohibitive; in both the statutes are by title called tax bills, and to both the same treatment must be accorded, viz., they are revenue bills, because Congress gives them that label and provides the machinery of levy and collection.
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> "It is immaterial what was the intent behind the statute. It is enough that the tax was paid and the probability or desirability of collecting any taxes is beside the issue."

One interesting question it seems to us in this case ought to have been discussed, i. e., what is the effect of an amendment to a bill offered in conference and adopted by both houses when it relates to taxation? The tax feature in the bill under discussion did not originate in either the House or the Senate, but in a joint conference Committee of both. It was as much the action of the House as of the Senate. Technically it did not orig-

inate in either; and yet it may be said to be as much the action of the House as of the Senate.

Another suit to test the law is still before the Federal District Court. That was brought by Weld & Neville to contest a tax of 2 cents a pound on foreign sales of 100 bales, which had not been carried out according to the form prescribed by the Lever act. In that case it has been contended that the tax was a violation of Article I of the United States Constitution, which provides that "the tax or duty shall be laid on articles exported from any state."

The October Term of the Supreme Court of the United States.

This august tribunal met on the 11th day of October, but as usual devoted that day to paying a visit to the President. The first case of any importance argued before the Court was upon the constitutionality of the Corporation Tax Law, or of the Income Tax Law, which was presented to the Court in the cases of Brushaber against Up. R. R. Tiee Realty Company *v.* Anderson, Thorne *v.* Anderson, Dodge *v.* Brady, Staunton *v.* Baltic Mining Company, and Anderson *v.* 42 Broadway Company. The constitutionality of the alien labor law of the State of New York is before the Court in Heim *v.* McCall, and Crane *v.* People of the State of New York. The case of Truax *v.* Raich, the validity of the Alien Labor Law of the State of Arizona, which was initiated by virtue of the provisions for the initiative and referendum of that state. The docket of the court seems to contain about the usual number of cases.

How to Restrain Unfair Methods of Competition.

The definition of the term "Unfair Methods of Competition" which appears in the Federal Trade Commission Law and the Clayton Act has not yet been attempted, but in a recent decree of the Circuit Court of the United States for the District of Indiana, in the case of U. S. A. *v.* S. F. Bowser & Co., Inc., Etc., the Court seems to have set out a system which, if followed, would practically

decide just what could be done. This company, which was sued with several individual defendants, did not defend the suit brought against them, but consented to a decree setting out that they were engaged in a combination to restrain, and in an attempt to monopolize interstate trade and commerce, in violation of the Sherman Law, and enjoining them:

(a) From making or causing to be made to customers or prospective customers or competitors, false representations concerning the standing, financial or otherwise, or the business methods, of such competitors, with the purpose or intent to injure such competitors in their business; and from making any false representations concerning the quality of pumps, tanks or outfits manufactured by competitors, or the ability of such pumps, tanks or outfits to meet the requirements of the National Board of Fire Underwriters;

(b) From bringing or threatening to bring suit against competitors, their customers or prospective customers, upon the claim, known to be false or not believed in good faith to be well founded, that the products of such competitors are an infringement of the patent rights of defendants;

(c) From hiring, bribing or employing architects, fire marshals, insurance representatives, or municipal officers or employees, to use their influence in promoting the sale of defendants' products, or in preventing the sale of the products of competitors;

(d) From procuring detectives, agents or representatives to enter into or take employment in the factories, buildings, shops or offices of competitors, without their consent, for the purpose of obtaining information concerning their business;

(e) From inducing or hiring draymen, railroad employees or other persons to obtain from shipments made by competitors, or from other sources, the names and addresses of their customers; except that the traveling salesman of defendants, in making reports of prospective customers upon whom they have called, or employees engaged to make canvasses for the purpose of ascertaining the names and addresses of prospective customers, may report the name of the pump, tank or outfit owned by such

prospective customer, if the purpose in so doing is not to injure in any manner the business of a competitor;

(f) From securing or attempting to secure, or bring about in any manner, the cancellation of orders taken or sales made by competitors, or interfering in any way with contracts entered into by competitors with purchasers of their pumps, tanks, or outfits;

(g) From promising or agreeing to indemnify customers or prospective customers of competitors against losses from litigation or otherwise, on condition that they cancel their contracts with such competitors;

(h) From reducing the prices of pumps, tanks or outfits below the cost of production, or giving them away, in order to prevent sales by competitors; or discriminating in prices between different persons or localities with the purpose or intent thereby to destroy or injure the business of a competitor;

(i) From inducing or hiring salesmen, agents, or other employees of competitors to leave their employment and enter the employ of defendants; but nothing in this section shall prevent defendants from hiring salesmen, agents, or other employees of competitors who shall have left, without any inducement from defendants, their employment and shall have applied to defendants for situations;

(j) From committing or causing to be committed any other similar acts of unfair competition, the purpose or effect of which shall be to injure or destroy the business of any competitor, to substantially lessen competition in or otherwise restrain interstate trade or commerce in pumps, tanks, or outfits, or tend to create a monopoly therein in favor of defendants.

It seems to us that this is about as complete as an injunction can be made, and no definition is now needed.